In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-217

LEONARD SUTTON, EXECUTOR OF THE ESTATE OF SAM SUTTON, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The sole question raised by the petition is whether a claim against petitioner arising out of an antenuptial agreement was supported by "adequate and full consideration in money or money's worth" so as to be deductible for federal estate tax purposes under Section 2053 of the Internal Revenue Code of 1954.

The decedent, Sam Sutton, died testate on August 19, 1967, survived by his wife Helen and son Leonard, who was appointed executor of decedent's estate. The decedent and Helen were married on December 18, 1965 (Pet. App. 5). Approximately one month prior to their marriage, the decedent and Helen entered into an antenuptial agreement which provided, *inter alia,* as follows (Pet. App. 5-6):

ARTICLE I: In consideration of the provisions hereinafter contained, Helen S. Eisenson hereby waives, discharges and releases any and all right, title or interest whatsoever which she may acquire in the property, now owned or hereafter acquired, of Sam Sutton at any time hereafter by reason of the marriage.

ARTICLE II: In consideration of the provisions contained herein, Sam Sutton hereby waives, discharges and releases any and all right, title or interest whatsoever which he may acquire in the property, now owned or hereafter acquired, of Helen S. Eisenson at any time hereafter by reason of the marriage.

ARTICLE III: Each party waives, discharges and releases any and all claims and rights that he or she may acquire by reason of the marriage:

(a) To share in the estate of the other party upon the latter's death by way of dower, thirds, curtesy, widow's allowance, statutory allowance or distribution in intestacy; and

(b) To elect to take against the other party's last will and testament; and

(c) To act as executor or administrator of the other party's estate.

ARTICLE IV: (a) In the event that Sam Sutton predeceases Helen S. Eisenson, Helen S. Eisenson shall receive outright, free of any estate or inheritance taxes, the sum of Four Hundred ($400.00) Dollars per month so long as she lives (even if she marries again).

(b) In the event that Helen S. Eisenson predeceases Sam Sutton, Sam Sutton shall receive outright, free of any estate or inheritance taxes, the sum of Fifty ($50.00) Dollars per month so long as he lives.

* * * * *

ARTICLE X: The consideration for this agreement is the mutual promises herein contained and the marriage about to be solemnized. If the marriage does not take place, the mutual promises shall be null and void.

When this antenuptial agreement was executed, the decedent's and Helen's assets were respectively valued at $296,946.75 and $46,450. Each was fully aware of the other's monetary worth (Pet. App. 7).

The decedent's will directed his executor to pay Helen $400 per month in accordance with the antenuptial agreement. On the federal estate tax return, petitioner claimed a marital deduction under Section 2056 of the Code, based in part upon Helen's right to receive $400 per month for life. The Commissioner disallowed the deduction (Pet. App. 7-8). In the Tax Court, petitioner also argued that the value of Helen's right to $400 per month was deductible as a claim against the estate under Section 2053 of the Code (Pet. App. 8). The Tax Court rejected petitioner's contentions and the court of appeals affirmed *per curiam* (Pet. App. 12-14, 16-18).

1. Section 2053(a)(3) provides an estate tax deduction for claims against the estate. However, under Section 2053 (c)(1)(A) of the Code, claims founded on a promise or agreement are deductible only to the extent that they were contracted "for an adequate and full consideration in

money or money's worth."[1] Section 2053(e) refers to Section 2043(b), which specifically provides that the relinquishment of marital rights in the decedent's property or estate shall not be treated to any extent as consideration in money or money's worth.

Here, both courts below recognized that Helen's claim against the estate was based upon the antenuptial agreement in which she agreed to relinquish all claims and marital rights which she might have against the property and estate of her husband, in return for which she would be entitled to $400 per month for the remainder of her life if he should predecease her. The agreement also provided that if she predeceased her husband, he would be entitled to $50 per month for life. In substance, the antenuptial agreement consisted of two separate agreements, calling for each party to relinquish prospective claims in the property and estate of the other in exchange for a contingent life estate. Thus, the essence of the agreement was a reciprocal relinquishment of marital rights, which Section 2043(b) explicitly provides cannot constitute adequate and full consideration in money or money's worth. See, *e.g., Commissioner* v. *Wemyss,* 324 U.S. 303; *Merrill* v. *Fahs,* 324 U.S. 308; Lowndes, Kramer, McCord, *Federal Estate and Gift Taxes,* pp. 395-397 (1974 ed.).

2. Contrary to petitioner's contention (Pet. 7-8), the decision below does not conflict with *Latty* v. *Commissioner,* 62 F. 2d 952 (C.A. 6). Unlike the situation here, that case did not involve a relinquishment of marital rights, which cannot as a statutory matter constitute adequate and full consideration for estate tax purposes.

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[1]The mere fact that a claim is enforceable under local law is not enough to support a deduction under Section 2053. There must be a consideration in money or money's worth of benefit to the decedent; detriment to the claimant is insufficient. *Taft* v. *Commissioner,* 304 U.S. 351; *United States* v. *Stapf,* 375 U.S. 118, 131.

In *Latty*, a father entered into an agreement with his daughter whereby he would create a trust for her and, pending creation of the trust, pay her a yearly sum. In return, the daughter promised to make no claim against his estate and not to contest his will. The father made the required payments during his lifetime but he did not create the trust. After the father's death, his estate paid the daughter an amount equivalent to the value of the trust and attempted to deduct the payment as a claim against the estate. The court upheld the disallowance of the deduction since the payment to the daughter, founded upon her promise to make no claim against the estate, was not based upon a consideration "in money or money's worth." See also *Estate of Isadore Rubin* v. *Commissioner*, 57 T.C. 817, 825, affirmed, 478 F. 2d 1399 (C.A. 3). Nothing in *Latty* casts doubt upon the correctness of the decision below.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.